

SUBJECT: APPOINTMENT OF PRIZE COMPETITION JUDGES AND ESTABLISHING JUDGING PROCESS

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PURPOSE

The purpose of this guidance is to provide assistance to the Department of Health and Human Services (HHS) in light of the recent passage of the America COMPETES Reauthorization Act of 2011 (Competes Act) on January 4, 2011. This guidance focuses on the following two elements of prize competitions under the Competes Act:

- A. Selection and appointment of qualified judges to select the winner or winners of prize competitions in order to ensure that the judges appointed for such competitions are fairly balanced and operate in a transparent manner; and
- B. Process by which judging is done.

This guidance may be used for prize competitions conducted under authority other than the Competes Act only to the extent that this guidance is applicable and consistent with the authority used for such a non-Competes Act prize competition. Agencies should use caution in applying this guidance to non-Competes Act competitions to ensure that they do not mistakenly apply restrictions or exemptions only applicable under the Competes Act.

All organizations should comply with this guidance when administering a prize competition under the Competes Act. For additional assistance, Operating Divisions (OPDIVs) and Staff Divisions (STAFFDIVs) should consult the HHS Innovation Council (Council).

REFERENCES

The authority of the Council to promulgate guidelines for the appointment of judges derives from the following provisions of law:

- A. Section 105(a) of the Competes Act, which adds Section 24 to the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. 3701 et seq.).
- B. Memorandum, "Delegation of authority under Section 105 of the America Creating Opportunities to Meaningfully Promote Excellence in Technology, Education, and Science (COMPETES) Reauthorization Act of 2010 (Pub. L. No. 111-358), as amended," which delegates the authority under Section 24(k)(3) to develop guidelines for the appointment of judges to the Chair(s), Council.

COVERAGE AND EXCLUSIONS

A. Coverage.

1. This guidance applies to all individuals serving as judges who are “employees” within the meaning of 5 C.F.R. § 2635.102(h), special Government employees (except to the extent they may be specifically excluded from certain provisions), and uniformed service officers in the U.S. Public Health Service Commissioned Corps on active duty who are selected and appointed as qualified judges to choose the winner(s) of prize competitions.
2. This guidance only applies to HHS-sponsored challenges.

B. Exclusions.

1. The exemption from the Federal Advisory Committee Act (5 U.S.C. App.) only applies to competitions conducted under the Competes Act where the committee, board, commission, panel, task force, or similar entity is created solely for the purpose of judging prize competitions. 15 U.S.C. 3719(k)(4).
2. This guidance does not apply to individuals who provide consultative services during the selection of topics for prize competitions.
3. This guidance does not apply to employees of the U.S. Department of Health and Human Services (HHS) participating as judges in non-HHS-sponsored prize competitions.

DEFINITIONS

The definitions set forth in this section are for purposes of this guidance only.

- A. **Agency.** Refers to the U.S. Department of Health and Human Services, an executive branch Department.
- B. **Applicant.** An entity, such as an individual, team of individuals, partnership, corporation, or organization that submits an entry to a prize competition.
- C. **Challenge.** Any contest in which a prize(s) is offered to a winning participant(s) where success depends on meeting the established criteria for award and on meeting the broader goal of stimulating innovation that has the potential to advance the mission of the agency sponsoring the challenge. Also referred to as a “Prize competition.”
- D. **Challenge Manager.** The HHS official with delegated authority under Section 105 of the Competes Act responsible for administering (e.g., managing and coordinating the planning and implementation) and funding a prize competition aimed at stimulating innovation; also referred to as the Contest Manager. Operating Division and Staff Division Heads may redelegate the Competes Act authority pursuant to the April 22, 2011 delegation of Competes Act authority. To the extent that the Challenge Manager’s duties are performed by a contractor, a government contracting officer shall review the statement of work set forth in the corresponding contract to ensure that only the government performs inherently governmental functions, as required by the Federal Acquisition Regulation, 48 C.F.R. § 7.503.
- E. **Contest Manager** (see “Challenge Manager”).
- F. **Deputy Ethics Counselor (DEC).** DECs are senior-level management officials, such as Deputy Assistant Secretaries or Deputy Directors, that are appointed by HHS’s Designated Agency Ethics Official (DAEO) in consultation with the head of each agency component. DECs are responsible for the overall management of their agency component’s ethics programs.

- G. **Judge.** An individual appointed by a Challenge Manager to select the winner(s) of the prize competition.
- H. **Judging panel or panel of judges.** A group of judges appointed for a specific prize competition.
- I. **Operating Division (OPDIV).** A major organization that is a component of HHS and whose primary function is to direct and manage substantive programs or major administrative services of HHS. The head of an OPDIV reports directly to the Secretary of HHS.¹
- J. **Participant.** Any entity, individual, or team of individuals that meets the eligibility, registration, and qualification requirements of the prize competition. In the case of a private entity, a participant: 1) shall be incorporated in and maintain a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States; and 2) may not be a Federal entity or Federal employee acting within the scope of his or her employment. 15 U.S.C. § 3719(g).
- K. **Prize.** A prize may be one or more of the following: 1) a point solution prize that rewards and spurs the development of solutions for a particular, well-defined problem; 2) an exposition prize that helps identify and promote a broad range of ideas and practices that may not otherwise attract attention, facilitating further development of the idea or practice by third parties; 3) a participation prize that creates value during and after the competition by encouraging contestants to change their behavior or develop new skills that may have beneficial effects during and after the competition; or 4) such other types of prizes as each head of an OPDIV or STAFFDIV considers appropriate to stimulate innovation that has the potential to advance the mission of the respective OPDIV or STAFFDIV. 15 U.S.C. § 3719(c), as amended by Section 105(a) of the Competes Act.
- L. **Prize competition** (see “Challenge”).
- M. **Special Government Employee (SGE).** A Special Government Employee (SGE) is an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis. 18 U.S.C. § 202(a). An SGE typically is recruited for temporary service because he or she provides outside expertise or perspectives that might be unavailable among an agency’s regular employees.
- N. **Staff Division (STAFFDIV).** An organization within the Office of the Secretary whose head reports directly to the Secretary.²

QUALIFICATION AND STATUS OF JUDGES

- A. **Qualifications.**
1. **Mandatory.** One or more qualified individuals shall be appointed as judges to select the winner or winners of a prize competition.
 2. **Discretionary.** Judges generally should possess the following criteria or qualifications:
 - a. Generalized knowledge of the subject matter; and
 - b. Recognized educational credentials or equivalent professional experience in areas or disciplines relevant to the prize competition.

¹ For a list of HHS’ OPDIVs, visit the HHS’ homepage, <http://www.hhs.gov/>.

² For a list of HHS’ STAFFDIVs, visit the HHS’ homepage, <http://www.hhs.gov/>

Judges may include individuals from outside the Agency, including from the private sector and other Agencies.

B. Restrictions.

1. **Mandatory Competes Act restrictions on judges.** The Competes Act mandates that a Judge shall not:
 - a. Have personal or financial interests in, or be an employee, officer, director, or agent of any entity that is a registered participant in a competition; or
 - b. Have a familial or financial relationship with an individual who is a registered participant. 15 U.S.C. 3719(k)(2).
2. **Mandatory ethics requirement(s).**
 - a. **In general.**
 - 1) Challenge Managers are responsible for working with the HHS Designated Agency Ethics Official (DAEO) or his designee to determine how the ethics requirements apply to judges and to ensure that all mandatory ethics requirements have been satisfied.
 - 2) Federal employees, including Special Government Employees, serving as judges shall comply with the Standards of Ethical Conduct for Employees of the Executive Branch contained in 5 C.F.R. Part 2635, as well as the executive branch financial disclosure regulations at 5 C.F.R. Part 2634, and relevant portions of the Employee Responsibilities and Conduct regulations at 5 C.F.R. Part 735.
 - 3) Federal employees, including Special Government Employees, serving as judges also are subject to Chapter 11 of the United States criminal code, "Bribery, Graft, and Conflicts of Interest." (For example, 18 U.S.C. §§ 201-209).
 - 4) The primary criminal conflict of interest statute, 18 U.S.C. § 208, also prohibits all employees, including SGEs, from participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interests or the financial interests of others with whom they have certain relationships.
 - b. **HHS employees.** In addition to the ethics requirements applicable to all Federal employees, HHS employees, including Special Government Employees, are required to comply with HHS' supplemental regulations, including Parts 5501 and 5502 of 5 C.F.R., and the relevant portions of HHS' standards of conduct regulations at 45 C.F.R. Part 73.
 - c. **Disclosure.** All judges are required under the Ethics In Government Act, as amended by the Ethics Reform Act of 1989 and 5 C.F.R. § 2634, to file a financial disclosure report when first appointed to a pool of judges, unless already required to do so as a current employee. All judges are thereafter required to file annually. A pdf copy of the OGE 450 form can be downloaded here: http://www.usoge.gov/forms/form_450.aspx.
 - d. **Training.** New judges who are not current employees are required by Subpart G of 5 C.F.R. Part 2638 to complete initial ethics orientation when first appointed to a pool of judges. All judges are required to complete annual ethics training subsequent to their initial ethics orientation.
3. **Mandatory Certificate.** Every judge shall sign the "Certificate for Personnel Participating As Judges for America COMPETES Prize Competition: Nondisclosure, Conflicts of Interest & Rules of Conduct," attached as Exhibit A.

C. Status. An individual appointed from the private sector to serve as a judge for a challenge will be appointed as an SGE.

D. Compensation. An SGE serving as a judge may not receive compensation unless authorized by statute. The Competes Act does not authorize compensation of judges or the payment of honoraria. Invitational travel expenses may be paid if the SGE-judge is an "expert or consultant" and is "paid on a daily when-actually-employed basis, or serving without pay. . .," in accordance with 51 U.S.C.

5703. For further advice on whether an SGE-judge for a particular competition may be paid invitational travel please contact your travel experts or the General Law Division. Regular, non-SGE employees serving as judges may not receive additional compensation from non-appropriated funds for their official service, under 18 U.S.C. § 209.

SELECTION OF JUDGES

- A. **Number of judges for each prize competition.** The Competes Act requires the appointment of one or more judges. 15 U.S.C. 3719(k)(1). The number of judges selected may vary by prize competition depending on the volume and technical complexity of applications anticipated and the range of expertise required. It is recommended that a minimum of 2 judges serve on a judging panel and/or that at least two judges review each application.
- B. **Selection.** The Challenge Manager shall ensure that judges selected and appointed for prize competitions are “fairly balanced” (e.g., represent a broad spectrum of expertise, experience, backgrounds, and/or opinions or perspectives).
- C. **Pool of judges.** The Challenge Manager should consider maintaining a pool of qualified judges from which judging panels for prize competitions will be selected. This pool should include a sufficient number of subject matter experts to meet anticipated prize competition needs.
 - 1. Any individual with requisite expertise may be selected from the pool by the Challenge Manager.
 - 2. Subject matter experts should be continually added to the pool to maintain representation of a wide range of expertise, experience, backgrounds, and opinions or perspectives.
 - 3. Individuals who wish to be considered for the pool of judges may submit their credentials (e.g., resume; background information; disclosure forms, where applicable) to the respective Challenge Manager. Acceptance to a pool of qualified judges does not guarantee that the individual will be appointed as a judge.
 - 4. The Challenge Manager shall evaluate each candidate’s qualification to serve on a judging panel, including obtaining conflict of interest analyses from the HHS DAEO or his designee, prior to assigning the candidate to the judging panel.
 - 5. If a judge subsequently participates on a judging panel for a prize competition but fails to fulfill his or her obligation without substantial justification, the Challenge Manager may remove the judge from the pool.
 - 6. In addition to Challenge Managers providing each prize competition with a judge(s) and a “fairly balanced” range of perspectives, the Challenge Manager also should seek to ensure that a variety of judges participate in the judging of the prize competitions; it is not in the best interests of the Agency to have the same individual involved in judging multiple challenges.
- D. **Public participation.** A major purpose and goal of the Competes Act (and the Stevenson-Wydler Technology Innovation Act of 1980) is to promote the exchange of scientific and technical personnel and ideas between academia, industry, and Federal laboratories (see 15 U.S.C. § 3702(5)). Therefore, public participation in prize competitions is vital to achieving that goal. Challenge Managers are required to post prize competitions on Challenge.gov. See “Judging Process,” Paragraph A(2)(c)(1). Challenge Managers are encouraged to engage the public by not only publicly promoting prize competitions but also by inviting the public to take part in the adjudicative process. For example, for a prize competition that requires no-to-minimal subject matter expertise of its judge(s) (e.g., evaluating a thirty second-long public service announcement), Challenge Managers may make submissions available to the public, via an online video service like YouTube, and may allow the public to vote on the submissions. Another option for consideration is to include a member(s) of the public who represents a relevant stakeholder group(s) but may not be a subject matter expert on the judging panel as an SGE. For example, if the development of a new medication is the goal of a

competition, a Challenge Manager may consider including a member of the public from a stakeholder group that might benefit from the new medication on the judging panel as an SGE, in addition to scientists, researchers and/or medical professionals.

JUDGING PROCESS

A. **Transparency.** In general, judges shall “operate in a transparent manner” (15 U.S.C. 3719(k)(3)), and there are multiple ways to satisfy this requirement:

1. **Mandatory minimum standards of conduct by judges.** Judges shall “operate in a transparent manner” in accordance with minimum standards of conduct, including:

- a. Basing prize proposal evaluation on the published evaluation factors for all prize competitions;
- b. Remaining free from bias in making selection decisions;
- c. Providing a written explanation to HHS demonstrating the basis of their selection decisions and the use of the published evaluation factors for those decisions;
- d. Not disclosing evaluation plans with any participants or other individuals except for immediate prize competition staff as necessary;
- e. Not disclosing a participant's proposal to another participant or other individuals except for immediate prize competition staff as necessary;
- f. Remaining free from conflicts of interest with participants;
- g. Disclosing to the Government any contact during a competition with a participant regarding prospective employment;
- h. Not accepting bribes, gratuities, or gifts from participants.

2. **Public notice.**

a. **Mandatory Federal Register notice.** For each prize competition, a Federal Register notice shall be published and shall contain the following mandatory information, per 15 U.S.C. 3719(f):

- 1) The subject of the competition;
- 2) The rules for being eligible to participate in the competition;
- 3) The process for participants to register for the competition;
- 4) The amount of the prize; and
- 5) The basis on which a winner will be selected.

b. Challenge Managers should consult the “Guidance for Federal Register Notice Required under the America COMPETES Act of 2010 for the Requirements and Registration of Challenges and Competitions” for additional guidance.³

c. Other.

- 1) Challenge Managers shall post information about a prize competition on Challenge.gov.
- 2) Challenge Managers are strongly encouraged to publish the names of prize competition judges’ prior to the prize competition’s submission deadline.

B. **Evaluation of proposals.**

1. **Initial qualification.** Challenge Managers should consider screening applicant submissions to ensure fulfillment of the minimum entry requirement(s) before compliant (i.e., qualified) submissions are evaluated by a judging panel.

2. **Single stage.** Prize competitions also may be structured to allow for a judge or a panel of judges

³ See www.HHS.gov/OPEN.

- to review every qualified submission.
3. **Multi-stage.** Prize competitions that designate a sub-section of participants as “finalists,” or that otherwise use terms that are likely to be construed as a representation that the sub-section of participants has attained an advanced standing in a prize competition, should clearly describe the basis for such designation and should state clearly that all or substantially all recipients, as the case may be, are similarly situated.
- C. **Deliverable.** It is generally the responsibility of Challenge Managers to ensure that judges are aware of the proper procedures for evaluating and selecting prize competition submissions.
1. **Evaluation factors.**
 - a. The Competes Act mandates that judges shall base evaluation of prize proposals on the evaluation factors published in the Federal Register notice. 15 USC 3719(k)(1).
 - b. It is also suggested that Challenge Managers provide judges with the relative weight or importance (e.g., assigned numerical point value) of each category or criteria.
 - c. It also is recommended that Challenge Managers provide each judge with the same standardized, short form, which reflects the evaluation factors being used to evaluate each submission and provides one or two lines of space for the judge’s feedback or comments.
 - d. Challenge Managers are responsible for ensuring that all judges have received a copy of the evaluation factors published in the Federal Register and for ensuring that judges understand that proposal evaluation shall be based on the published evaluation factors.
 - e. In addition to the standardized form provided to each Judge under paragraph c. above, the Challenge Manager shall request that each Judge provide a written narrative statement demonstrating the basis of every prize proposal evaluation conducted by the Judge and the use of the published evaluation factors for those evaluations. Additionally, the Challenge Manager shall review each judge’s written narrative statement to ensure that it demonstrates that the judge has evaluated each proposal using the established evaluation factors.
 2. **Freedom of Information Act (FOIA).** Judges and Challenge Managers should be aware that certain physical documents used in the judging process may be subject to disclosure under FOIA. Because the forms are subject to FOIA disclosure requirements, participants will be able to obtain substantive feedback on their respective submissions, which may make prize competitions more enticing. Challenge Managers should consult with their respective FOIA Officer or the Office of the General Counsel (OGC) for further guidance.
 3. **Personal notes.** During the judging process, a judge may be allowed to take and maintain his or her own personal notes, which are kept for the convenience of the judge as a memory jogger and not circulated to other judges or agency officials. Such personal notes generally are not subject to FOIA requirements.
- D. **Confidentiality.** The Council, Challenge Managers, judges, and prize competition staff shall treat as confidential all other comments and deliberations of the judging panel. Judges generally are prohibited from providing any information before, during, and after the review regarding the judges’ deliberations or recommendations to anyone outside the immediate prize competition staff. Application materials (unless already in the public domain, e.g., on a public website) and information about the judges’ comments or discussion on particular applications should not be divulged to, or discussed with, any persons not involved in the review process. Should a judge receive a request for application materials or information about panel comments, discussions, or recommendations, the judge should notify the Challenge Manager. Any persons requesting information about the review process, or about a specific application, should be referred to the Challenge Manager.

- E. **Fairness.** Any competition, challenge, or contest run by or with the involvement of a Federal agency shall be run so that participants are treated fairly and so that neither Judges nor the Challenge Manager has a conflict with a participant.
- F. **Agency support.** The OPDIV or STAFFDIV sponsoring a prize competition should provide support services to each judging panel established by it. Where a judging panel is convened for a prize competition that is sponsored by more than one OPDIV or STAFFDIV, only one OPDIV or STAFFDIV should provide support services at any one time.

OTHER CONSIDERATIONS FOR THE JUDGING PROCESS

- A. **Privacy Act.** Challenge Managers should consult with their respective OPDIV or STAFFDIV Privacy Officer to ensure that prize competitions address applicable Privacy Act requirements.
- B. **Paperwork Reduction Act (PRA).** Challenge Managers should consult with their respective OPDIV or STAFFDIV PRA Officer to ensure that prize competitions address applicable PRA requirements. For further information, see “HHS Innovation Council Program Managers Issues for Challenges and Competitions Conducted under the COMPETES Act: Compliance with Federal Policies Regarding Paperwork Reduction Act.”
- C. **Intellectual Property (IP).** Under the Competes Act, the Federal Government may not gain an ownership interest in the intellectual property of a submission without the applicant’s or participant’s written consent. The Federal Government may, however, obtain an ownership or license interest in the applicant’s or participant’s intellectual property by obtaining a written assignment or license agreement as a condition of entry in a prize competition or through negotiation during or after the competition. Interested parties should consult with OGC. Judges should be advised on any contest rules relating to IP that may be relevant to the eligibility or judging criteria or which may otherwise impact the judging process. For further information, see “HHS Questions and Answer Document on the COMPETES Act: Consideration of Intellectual Property Rights.”

REVISION OF GUIDANCE

The Council may consider the recommendations of OPDIV and STAFFDIV heads with respect to improving future iterations of this Guidance.

**Certificate for Personnel Participating As Judges for America COMPETES
Reauthorization Act of 2011 Prize Competitions:
Nondisclosure, Conflicts of Interest & Rules of Conduct**

Name: _____ Organization: _____

Title: _____ Email: _____

Title of Challenge: _____

- 1) I acknowledge that I have been selected to participate as a judge in the challenge identified above. I am aware that during the course of executing my duties in the above identified challenge, I may be exposed to business proprietary information, as well as internal deliberations leading to a decision naming a challenge winner.
- 2) I certify that I will not knowingly disclose any information obtained during the judging process (e.g., application materials not already in the public domain, comments and deliberations of the judging panel), directly or indirectly, to any person other than a person authorized by the head of the agency or party with legal rights to receive such information. I understand that unauthorized disclosure of such information may subject me to substantial administrative, civil and criminal penalties, including fine, imprisonment, and loss of employment under applicable laws and regulations.
- 3) To the best of my knowledge, I certify that I do not have personal or financial interests in, or am an employee, officer, director, or agent of, any entity that is a registered participant in a competition, and I do not have a familial or financial relationship with an individual who is a registered participant.
- 4) I certify that I will operate in a transparent manner in accord with the following minimum standards of conduct:
 - A. Will base each prize proposal evaluation on the published evaluation factors;
 - B. Will remain free from bias in making selection decisions;
 - C. Will provide a written narrative statement to the U.S. Department of Health and Human Services (HHS) demonstrating the basis of each evaluation of a prize proposal that I conduct, and the use of the published evaluation factors for those evaluations;
 - D. Will not discuss evaluation of matters related to competition entries or the judging thereof with any unauthorized individuals, including Government personnel, even after competition award, without specific prior approval from proper authority;
 - E. Will not disclose a participant's proposal to another participant or other individuals except for immediate prize competition staff as necessary;
 - F. Will remain free from conflicts of interest with participants;
 - G. Will disclose to HHS any contact during a competition with a participant regarding prospective employment;
 - H. Will not ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, accept, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of an applicant. I will advise my family that the acceptance of any such money, gratuity, or other thing of value may be imputed to me as a violation and must therefore be avoided.
 - I. Will not solicit or accept any promise of future payment, employment or business opportunity from, or engage, directly or indirectly, in any discussion of future payment, employment or business opportunity with any applicant or any officer, employee, representative, agent, or consultant of an applicant.
- 5) I understand that my obligations under this certification are of a continuing nature. If at any time during the judging process, I receive a contact from an applicant in the prize competition I am judging concerning

HHS Innovation Council

Guidance for the Appointment of Prize Competition Judges and Establishing Judging Process

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Exhibit A

payment, employment or other business opportunity or the offer of a gift from an applicant's competitor, or I encounter circumstances where my participation as a judge might result in a real, apparent, or potential conflict of interest, I will immediately seek the advice of an Ethics Counselor and report the circumstances to the Challenge Manager.

- 6) These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.)(governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Codes, and section 4(b) of the subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling.
- 7) The acknowledgement and signature provided does not bar disclosures to Congress or to an authorized official of an executive agency or the Department of Justice that are essential to reporting a substantial violation of law.

I understand that making a false, fictitious, or fraudulent certification may subject me to prosecution under Title 18, United States Code, Section 1001.

Name: _____

Organization: _____

Title: _____

Email: _____

Title of Challenge: _____

Signature

Date